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Supreme Court, U.S.
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Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MINNESOTA,

Petitioner,

v.

ELI A. HERSHBERGER, et. al.,

Respondents.

BRIEF OF MINNESOTA CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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INTEREST OF THE MINNESOTA CIVIL LIBERTIES UNION

The Minnesota Civil Liberties Union ("MCLU") appears as amicus curiae with the written consent of both parties. The MCLU is a non-profit, non-partisan organization appearing here to protect the rights and liberties established by United States Constitution.

It is the position of the MCLU that the Minnesota Supreme Court failed to recognize and correctly resolve the conflict this case presents between two branches of Free Exercise jurisprudence, and misapplied the precedent on which it did rely. These errors result in a decision that abrogates the Minnesota Legislature's authority to regulate conduct on government highways through commonly recognized signs of uniform size and shape, thus endangering interstate and local traffic on its highways.

ARGUMENT

This case exposes the collision between two branches of Free Exercise jurisprudence: Bowen v. Roy, 476 U.S. 693 (1986) and Lyng v. Northwest Indian Cemetery Protective Ass'n., 108 S. Ct. 1319 (1988) on one side, and Wisconsin v. Yoder, 406 U.S. 205 (1972), Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Board, 450 U.S. 707 (1981) and Hobbie v. Unemployment Commission, 107 S. Ct. 1046 (1987) on the other.

The Minnesota Supreme Court failed to follow Bowen v. Roy and its extension in Lyng, thereby deciding this case without considering relevant doctrines requiring a contrary outcome. Instead, the Minnesota Supreme Court analyzed this case under Wisconsin v. Yoder and Sherbert, but in so doing, it misconstrued those cases to again reach an incorrect result.

The errors in the Minnesota Supreme Court decision are of greater than merely local, Minnesota concern. Other states have faced similar legal questions and reached equally erroneous results.[1]

Moreover, the Respondents in this case reside in Fillmore County, along the Minnesota-Iowa border, surrounding an interstate highway. The hazard that the Minnesota Supreme Court created by sanctioning Respondents' use of unmarked slow-moving vehicles on the highways affects interstate as well as local traffic safety. Trial Court Order and Memorandum, p. 12 (Dec. 19, 1988).

Finally, the reasoning underlying the Minnesota Supreme Court's decision

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1. See, e.g., State v. Swartzentruber, 429 N.W.2d 225 (Mich. App. 1988) appeal den'd., 432 N.W.2d 872 (1989); Commonwealth v. Zook, No. 85-T-264 (Barron County District Court, Ky., Aug. 3, 1985); Fussner v. Smith, No. C-76-363 (N.D. Ohio, Nov. 28, 1977); State v. Weaver, No. 77-TR-D-634 (Holmes County Court, Ohio, Sept. 7, 1977).

results in broad legal consequences. Not only is safety jeopardized for local and interstate travellers, but a State Legislature has lost authority to assure safety on government roadways.

The conflict between Yoder or Sherbert and Lyng v. Northwest Indian Cemetery Protective Ass'n. centers on the extent to which the Constitution empowers citizens to veto facially neutral government regulations that have incidental effects making it more difficult to practice certain religions, but that do not prohibit the free exercise of religion. Where the effects on religious practices are incidental to the State's regulation of its own land, First Amendment strict scrutiny is not implicated. Lyng, 108 S. Ct. at 1326.

In analyzing whether religious effects are incidental here, it is important to note that this case is not like Wisconsin

v. Yoder. Yoder involved forcing Amish children to attend school until age 16. The Court noted that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable . . . ." Yoder, 406 U.S. at 218. The instant case presents a far more incidental effect because the Respondents here are under no compulsion to use the government roadways. Rather, only when the Respondents voluntarily use the State's lands must they conform their use to neutral state safety standards that depend for their effectiveness on uniformity and general recognizability.

Voluntariness has long been a focus of the Court's evaluation of state activity that has incidental effects on religious practice. For example, in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Court explained that

> [w]here a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution . . . . [T]hose who take advantage of its opportunities may not on ground of conscious refuse compliance with such conditions. Hamilton v. Regents 293 U.S. 245 [(1934)].

319 U.S. at 631-632. See also Abington School District v. Schempp, 374 U.S. 203, 252-53 (1963) (Brennan, J. concurring). The instant case does not present the government coercion against which Yoder, Schempp and Barnette guard.

Nor do the Court's unemployment compensation cases require a contrary result. Sherbert, Thomas and Hobbie dealt with state denials of benefits to individuals who did not work because circumstances of employment conflicted with religious beliefs. The Court's application of a strict scrutiny analysis in those cases is distinguishable from this action on two important grounds.

First, the unemployment compensation cases involved the States' explicit determination to single out religious belief from a host of other circumstances that do justify an individual's unemployment. In contrast, Minnesota has approved no "exemptions" to use of SMV emblems while targeting religious beliefs for exclusion. Rather, the State demonstrated that a slow-moving vehicle ("SMV") symbol of a single shape and size is critical to conveying the safety message.

Second, Sherbert, Thomas and Hobbie implicated neither continuing government control over the public use of its property nor state interests in public safety.

Lyng held that facially neutral government acts "which may make it more difficult to practice certain religions but which have no tendency to coerce

individuals into acting contrary to their religious beliefs," are not within the prohibition of the First Amendment. Lyng, 108 S. Ct. at 1326. Despite the reality that Native Americans may lose their ability to practice their religion, the exercise of which is intimately bound-up in National Forest land, they may "not divest the Government of its right to use what is, after all, its land." Lyng, 108 S. Ct. at 1327 (emphasis in original). The petitioners in Lyng must acquiesce in government control over the use of government land which significantly effects their religious practices.

Similarly, the Respondents in this case are required to acquiesce in neutral government regulation of its roadways. The SMV law concededly is facially neutral. To excuse conformity with state safety regulations would be tantamount to

granting Respondents "de facto beneficial ownership of some rather spacious tracts of public property" Lyng, 108 S. Ct. at 1327, because their insistence on traveling the State's highways without displaying the State's SMV emblem renders those roadways hazardous to the rest of the travelling public.

Requiring Respondents to affix a conforming sign to their vehicle if they choose to use Minnesota roadways does not distinguish this case from the rationale of Lyng and Roy. The Native Americans in Lyng had to alter their religious practices to accommodate road construction on the sacred lands that serve as the central focus of their religion. In Roy the government was permitted to use a social security number against individual will, without implicating First Amendment prohibitions. If Roy and Lyng demonstrate only

incidental effects of permissible government programs on religious belief, this case even more strikingly compels the conclusion that the Respondents are not unduly burdened. Unlike the Native Americans in Roy and Lyng, Respondents have voluntarily subjected themselves to neutral government regulation by opting to use State roads.

The MCLU suggests that, like the petitioners in Lyng, the Respondents' religious beliefs are only incidentally effected by Minnesota Statutes § 169.522. Respondents may no more dictate safety standards on State property for themselves and the travelling public than the Native Americans in Lyng may prohibit road construction on National Forest property, or, as a logical extension, dictate State regulation of the use of that road once it is built.

The Minnesota Supreme Court ignored Lyng and only superficially addressed Roy v. Bowen, noting a distinction between a burden accompanied "by threat of penal sanction" and the facts of Roy which did not present an identical threat. State v. Hershberger, 444 N.W.2d at 287. This distinction rests merely on the procedural posture on which these cases arose, rather than on a workable analysis of the interests.

For example, had the Native Americans in Lyng insisted on conducting a religious ceremony in the middle of the government's road construction, they too may have been subject to penal sanction. Instead, the Lyng petitioners sought a judicial determination of the government's activity rather than violate the law. The Respondents here could have sought a declaratory judgment holding Minnesota Statute § 169.522 unconsti-

tutional, but instead, it was only by their deliberate violation of the law that this challenge arose.

The Minnesota Supreme Court's casual dismissal of Roy v. Bowen analysis led that court to the wrong result. For the reasons this Court expressed in Lyng, First Amendment protection does not extend to Respondents' conduct here, and the lower court decision should therefore be reversed.

Although the Minnesota Supreme Court should not have required the State to bring forward a compelling justification for its otherwise lawful actions, that court also erred in its application of strict scrutiny analysis.

Strict scrutiny review requires that the court determine whether a compelling state interest can be achieved by less intrusive means. See, e.g., Thomas, 450 U.S. at 713-19. The Minnesota Supreme

Court has conceded that "the State's concern for safety of the public using the highways, including Respondents, is a legitimate compelling state interest." State v. Hershberger, 444 N.W.2d at 288. Public safety is a strong justification for upholding legislation in the face of a Free Exercise challenge.

As this Court explained in Sherbert, 374 U.S. at 403:

> [T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." Braunfeld v. Brown, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. (citations omitted).

The Respondents' insistence on using the roads without displaying an SMV symbol of uniform size and shape is a hazard to

public safety that should not be shielded by the First Amendment.

The findings of the Trial Court demonstrate that, for three reasons, there is no less intrusive means of achieving public safety while accommodating Respondents. First, the SMV symbol is "almost universally the same in design and recognition throughout the United States. It is included in most Driver's Trainer Manuals so it is easily recognizable in all areas by all users of our highways." Trial Court Order and Memorandum, pp. 14-17 (Dec. 19, 1988). The State proved that instant recognition and understanding through an emblem of uniform size and shape must be preserved to promote highway safety.

Second, the Minnesota Supreme Court erroneously rationalized that, because the State allowed one alternative color scheme, the Court was free to conclude

that any number of alternative shapes and sizes of reflectorized warnings are equally efficacious. State v. Hershberger, 444 N.W.2d at 289.

The mistake of the Minnesota Supreme Court is that it ignored the Trial Court's determination that uniformity of size and shape, which is consistent in both the regular and alternative emblem, is essential for achieving the state's compelling safety objectives.

Finally, there is no less intrusive means of serving the State's need for recognized signage to achieve its compelling interest. The State demonstrated that random arrangement of lanterns and reflective tape, which the Minnesota Supreme Court approved, does not provide a uniform, recognizable indication that a vehicle is slow-moving. Where no alternative means exists which would satisfy both the state's compelling

interest and the Respondents' First Amendment rights, the State's interests must prevail. Yoder, 406 U.S. at 215; United States v. Lee, 455 U.S. 252, 259-62 (1982).

The three-part test developed in Lemon v. Kurtzman, 403 U.S. 603 (1971) serves as a foundation for Establishment Clause analysis. First, government action must serve a secular purpose. Second, a primary effect of government action cannot be to advance religion. Third, government action cannot foster an excessive entanglement of the State with religion.

The result of the Minnesota Supreme Court's failure to acknowledge that under Lyng the incidental effects of Minnesota's SMV law on Respondents' religious beliefs disqualify this case for strict scrutiny, and its further failure to recognize that the Minnesota

Legislature's compelling interest in promoting highway safety is not served by reflector tape markings of random size and shape, is that Respondents and all "those entertaining religious beliefs similar to those of these [Respondents]," 444 N.W.2d at 289, are uniquely privileged to use Minnesota's highways displaying no warning markings at all.

The decision has the effect of exclusively assisting one particular religion, the Old Order Amish, in the advancement of its religious doctrine that a triangular SMV sign is a "Worldly Symbol" signifying that the user is putting faith or trust in men and not God. Cf. Trial Court Order and Memorandum at 4. The Minnesota Supreme Court's decision creates an explicit connection between the State and the religious order of the Amish, advancing that religion by allowing its proponents

special rights, which individuals outside that religious group cannot enjoy, and which is motivated wholly by religious considerations. Cf. Lynch v. Donnelly, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980).

Reversal of the Minnesota Supreme Court's decision further requires the Court to consider Minnesota Rule 7440.0350 (See Brief of Petitioner at 8), which implements Minnesota Statutes § 169.522, Subd. 1(b) (See Brief of Petitioner at 7), and expressly limits the class of individuals who may display an alternate SMV symbol only to persons who "have sincerely held religious beliefs prohibiting their use of the standard SMV emblem" and who make an application containing "a statement of the conflicting religious principles or tenets upon which the Applicant's objection to the display of the standard

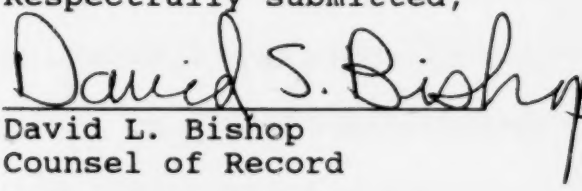
SMV emblem is based." The State's rules implementing its alternate SMV emblem statute were created solely to provide the Amish with a benefit in keeping with their particular religious beliefs, with no discernible secular purpose, and with the primary, if not exclusive effect of advancing Respondents' religion. Cf. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985). Upon remand, the trial court must consider whether the statute as implemented by the Minnesota Rules is unconstitutional because both its purpose and its effect are flawed.

CONCLUSION

The Minnesota Civil Liberties Union, as amicus, respectfully requests that the United States Supreme Court grant a writ of certiorari in this case to determine whether Respondents' religious beliefs

are incidental to facially neutral State regulation of its land and internal affairs, and whether the State's Statute demonstrates the least intrusive means of serving its interest in promoting uniform highway safety. It is the position of the MCLU that the Minnesota Supreme Court has decided a federal question in conflict with the applicable prior decisions of this Court.

Respectfully submitted,



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